In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 931

MARTIN LEMLICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted, after a jury trial in the United States District Court for the Southern District of Florida, on twenty counts charging willful failure to file employer's quarterly tax returns (Form 941), in violation of 26 U.S.C. 7203 (Pet. App. 1; R. 3). His defense was that his failure to file said returns was not willful or with an evil motive because, he testified (R. 46–49), he lacked the funds needed to pay the taxes involved and believed that he could not file such returns without also making payments. That defense was considered by the jury under proper instructions, and was rejected. On appeal the conviction was affirmed (Pet. App. 1–3).

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Petitioner does not now contend that the evidence was insufficient to support his conviction. Rather, his sole claim is that his Sixth Amendment right to the effective assistance of counsel (Pet. 5) was infringed when government counsel, in cross-examination, asked him whether his attorney had ever told him that, at pre-indictment conferences with Internal Revenue Service officials (R. 58), he had "raised the question of the fact that you did not think you could file these without paying money * * *" (R. 60). Petitioner's reply was as follows (R. 60): "He didn't tell me what he had discussed there. He merely said that he struck out pretty well, and he didn't think that he had done any good, that is all."

Government counsel then immediately turned to another subject (R. 60), and the matter was not pursued any further.

Petitioner concedes that "the question raised herein is a point of first impression" (Pet. 4) and that an attorney acting, as here (see R. 58), under a power of attorney "can bind his client by incriminating statements" (Pet. 6), but asserts that "it is inconceivable that his attorney's silence can bind his client and give a jury an adverse, prejudicial inference" (Pet. 6).

Even assuming that there is merit to the contention that an attorney should feel free to conceal his client's explanations or defenses at conferences preceding a final decision by the IRS to recommend prosecution and that, consequently, a jury should not be invited to consider any failure by counsel to mention a defense at such a conference, there is no foundation for the

claim of error made by petitioner on the facts of this case. Here the jury, in view of petitioner's answer to the question posed about his attorney's discussions with IRS officials (*supra*, p. 2), never learned whether or not the defense involved had been mentioned by the attorney. They were thus given no basis for any inference unfavorable to petitioner in regard to his asserted defense.

Moreover, even if there were a suitable foundation for the claim, petitioner's contention would nonetheless be without merit, since proof of intent or knowledge in criminal cases frequently consists of evidence that the defendant remained silent at a time when, as the jury might infer, an innocent person would have offered some explanation. The same logic would apply where an explanation could reasonably be expected from an attorney specifically authorized to represent a taxpayer during a pre-indictment period when a reasonable explanation might obviate prosecution entirely. And if the attorney withheld explanations or defenses for purely tactical reasons, he would be free to testify to that effect at trial, thus erasing any adverse inference which might otherwise be drawn.

It should also be noted that, although petitioner's counsel, prior to the question and answer now complained of, objected "to anything in light of what happened in these conferences" (R. 58–59), he failed to make known to the trial court the grounds of his objection as required by Rule 51, F.R. Crim. P. And, after the question was asked, petitioner's counsel reg-

istered no further objection, failed to move to strike the question or answer, and (so far as appears from the record) requested no curative instruction (see Rule 30, F.R. Crim. P.). Finally, petitioner never presented his current Sixth Amendment contention to the court of appeals, where his claim—rejected by that court—was simply that "the hearsay rule and attorney-client privilege were violated" (Pet. App. 3).

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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